

January 8, 2012

Mark S. Manion
Price, Postel & Parma, LLP
P O Box 99
Santa Barbara, CA 93102- 0099

Re: Your Request for Informal Assistance
Our File No. I-12-173

Dear Mr. Manion:

This letter responds to your request for advice, on behalf of Montecito Fire Protection District Board Member Gene B. Sinser, regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ This letter is based on the facts presented. The Fair Political Practices Commission (“the Commission”) does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Additionally, nothing in this letter may be construed to evaluate any conduct that has already taken place. Because your questions are general in nature, we are treating your request as one for informal assistance.²

Please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other laws that may apply such as Government Code Section 1090 or common law conflict of interest.

QUESTION

May Board Member Sinser take part in governmental decisions regarding the District’s Station 3 Project despite owning property within 500 feet of the boundaries of the project?

CONCLUSION

Board Member Sinser’s economic interest in his residence is directly involved in decisions related to the Station 3 Project. The financial effect of the decisions on this economic

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114, Regulation 18329(c)(3).)

interest is presumed to be material. Accordingly, Board Member Sinser may not make, participate in making, or influence the decisions unless he can (1) rebut the presumption of materiality by showing that it is not reasonably foreseeable the decisions will have even a one-penny financial effect on his residence and (2) determine that there will be *no* reasonably foreseeable material financial effects on any other economic interest he may have.

FACTS

Board Member Sinser was elected to the Montecito Fire District Board of Directors on November 6, 2012. Board Member Sinser's residential address is located on East Valley Road, within the Montecito community and the jurisdiction of Montecito Fire Protection District. This property is owned by Board Member Sinser and Patty L. De Dominic, as trustees of the Sinser-De Dominic Living Trust. You estimate that the property is valued in excess of \$1,000,000.

For nearly a decade, the Montecito Fire District (the "District") has planned the expansion of its service to the eastern part of the Montecito community by adding a third fire station (the "Station 3 Project"). The District completed a site selection study in 2008 and ultimately selected a 2.75 acre portion of a parcel site located at 2500 East Valley Road. In 2010, the District's board of directors approved an Option Agreement with the property owner in which the District has a right to acquire the land for the Station 3 Project provided that the District meets certain conditions.

The District's board of directors approved the project and certified an Environmental Impact Report ("EIR") for the project in April 2012. AMEC Earth & Environmental was retained to prepare the EIR and has been previously authorized to prepare and submit an application to the County of Santa Barbara for a conditional use permit and other entitlements. Presently, the District's application is being processed by the County of Santa Barbara. Moreover, the District's actions to certify the EIR and approve the project have been challenged by an association identified as the Montecito Agricultural Foundation, and a petition for writ of administrative mandamus is pending in Superior Court. In light of the District's Station 3 Project, the Board will be faced with additional decisions to make before the project can move forward and may, at any time, consider proposed actions that would change the course of ongoing processes.

The eastern part of Montecito is a semi-rural residential area with estate-sized parcels and some agricultural uses. East Valley Road, where both the Station 3 Project site and the Sinser property are located, is a two-lane road with rural characteristics. Those parcels adjacent to or located close enough to be potentially impacted by having a fire station in the proposed location represent a small fraction of the District's jurisdiction and only a few property owners. In an email on December 22, 2012, you confirmed that Board Member Sinser's property is located within 500 feet of the boundaries of the proposed location for the Station 3 Project.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a “financial interest” in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official’s economic interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision.

Step One: Is the individual a “public official?”

The Act’s conflict-of- interest provisions apply only to “public officials.” (Sections 87100, 87103; Regulation 18700(b)(1).) A “public official” is “every member, officer, employee or consultant of a state or local government agency...” (Section 82048.) As a member of the Montecito Fire Protection District Board of Directors, Board Member Sinser is a public official within the meaning of the Act.

Step Two: Is the official making, participating in making, or influencing a governmental decision?

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.) A public official “participates in a governmental decision” when, acting within the authority of his or her position and without significant intervening substantive review, the official negotiates, advises, or makes recommendations to the decisionmaker regarding the governmental decision. (Regulation 18702.2.) A public official is attempting to use his or her official position to influence a decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Regulation 18702.3.) Board Member Sinser is making, participating in making, or influencing a governmental decision when taking part in decisions regarding the District’s Station 3 Project.

Step Three: What are the official’s economic interests?

Of the economic interests recognized under the Act³, the only interest implicated by your account of the facts is Board Member Sinser’s economic interest in his personal residence, as an official has an economic interest in any real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)⁴

³ Our analysis is limited to the economic interests you have identified.

⁴ We note that a public official always has an economic interest in his or her personal finances. A governmental decision will have an effect on this economic interest if the decision will result in the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing.

Step Four: Is the official's economic interest directly or indirectly involved in the decision?

Regulation 18704.2(a)(1) states, in pertinent part, that real property in which a public official has an economic interest is *directly* involved in a governmental decision if “[t]he real property in which the official has an interest, or any part of that real property, is located within 500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the governmental decision....”⁵

From the facts you have provided, Board Member Sinser's residence is within 500 feet of the District's Station 3 Project. Accordingly, Board Member Sinser's economic interest in his residence is *directly* involved in government decisions regarding the project under Regulation 18704.2(a)(1).

Steps Five and Six: Will there be a reasonably foreseeable material financial effect on the official's economic interest?*Materiality*

Having identified the economic interest involved and determined that the interest is directly involved in the decision at issue, it is necessary to identify the materiality standard appropriate to Board Member Sinser's economic interest in his residence.

Under Regulation 18705.2(a)(1), *any* financial effect of a governmental decision on real property directly involved in the governmental decision is presumed to be material. This presumption may be rebutted only by proof that it is not reasonably foreseeable that the governmental decision will have *any* financial effect on the real property. (*Ibid.*) However, the size of the financial effect does not matter. If there is *any* financial effect at all, even “one-penny,” that effect is presumed to be “material.”

Foreseeability

Once a public official has determined the materiality standard applicable to each of his or her economic interests, the next step is determining whether it is “reasonably foreseeable” that the standard will be met. A material financial effect on an economic interest need not be certain or even substantially likely to be “reasonably foreseeable,” but it must be more than a mere possibility. (Regulation 18706(a); *In re Thorner* (1975) 1 FPPC Ops. 198.)

Ultimately, whether a material financial effect is foreseeable at the time a decision is made depends on facts and circumstances peculiar to each case. (*In re Thorner, supra.*) Because

(Section 87103; Regulation 18703.5.) However, a financial effect on the value of real property owned directly or indirectly by a public official is not considered a separate financial effect on the official's personal finances and would not be analyzed separately under the “personal financial effects” rule. (Regulation 18705.5(a).)

⁵ “If a public official's economic interest is not directly involved in a governmental decision, it is indirectly involved.” (Regulation 18704(a).)

the Commission does not act as a finder of fact in providing advice (*In re Oglesby, supra*), the foreseeability of a particular financial effect is a determination that must be left, in most instances, to the informed judgment of the public official.

However, based upon the facts provided, you have indicated a reasonably foreseeable material financial effect on Board Member Sinser's economic interest in his residence because it is certainly foreseeable that a fire station located within 500 feet of his residence is worth at least one penny. Accordingly, Board Member Sinser may not make, participate in making, or influence the decisions unless he can rebut the presumption of materiality by showing that it is not reasonably foreseeable the decisions will have *any* financial effect on his real property. (See Regulation 18705.2(a)(1).)

Steps Seven and Eight: Does the governmental decision come within any exception to the conflict-of-interest rules?

Even if an official has a conflict of interest, disqualification is not required if the governmental decision affects the public official's economic interests in a manner that is indistinguishable from the manner in which the decision will affect the public generally. (Section 87103; Regulation 18707(a).)

Additionally, in certain rare circumstances, a public official may be called upon to take part in a decision despite the fact that the official may have a disqualifying conflict of interest under the "legally required participation" exception. This exception applies only in certain very specific circumstances where the government agency would be paralyzed from acting. (Section 87101; Regulation 18708.)

However, you have not presented any facts indicating that the "public generally" or the "legally required participation" exceptions are applicable to Board Member Sinser's circumstances, so we will not address them further.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Brian G. Lau
Counsel, Legal Division

BGL:jgl